Filed 3/30/05 Lujano v. Regents CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RUFINO LUJANO et al., Plaintiffs and Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	B165153 (Los Angeles County Super. Ct. No. SC064353)

APPEALS from a judgment and a new trial order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Order granting new trial affirmed.

Brian K. O'Connor for Plaintiffs and Appellants.

Garrard & Davis, Steven D. Davis; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendant and Appellant.

Plaintiffs Rufino Lujano (the father) and Ma Del Carmen Lujano (the mother) (collectively, Lujano) appeal an order granting a motion for new trial brought by defendant Regents of the University of California (Regents). (Code Civ. Proc., § 657.)[1]

The Regents, in turn, have brought a protective cross-appeal from the judgment on the verdict.

The essential issue presented is whether the trial court properly granted a new trial based on an oral statement by the jury foreperson identifying the negligent conduct upon which the verdict was based. We conclude the trial court's inquiry improperly delved into the jury's thought processes and the foreperson's statement must be disregarded.

Nonetheless, the trial court's error in granting a new trial based on the foreperson's statement was harmless because the grant of a new trial was correct in result and therefore must be upheld. Here, the Regents' motion for new trial raised multiple grounds, including *insufficiency* of the evidence to support the verdict against the Regents. In addressing the issue of insufficiency, we are mindful the jury did *not* find that either Dr. Koh or Dr. Spence was negligent. Consequently, the verdict against the Regents can be upheld only if there is substantial evidence to support a theory of liability that implicates negligent conduct by some other employee or employees of the Regents. Leaving aside the negligence of Drs. Koh and Spence, which remains to be determined, Lujano failed to present substantial evidence to support a theory of liability that implicates negligent conduct by another Regents' employee. Therefore, the new trial order is affirmed.

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.

Decedent Gabriela Lujano, who was six or seven at the time, developed muscle problems in February 2000. She was referred to UCLA Hospital for a muscle biopsy.

Gabriela was admitted to UCLA at 6:30 p.m. on March 2, 2000. Dr. Susan Koh (Dr. Koh) and Dr. Sarah Spence (Dr. Spence), employees of the Regents, were in charge of Gabriela's care at UCLA. Upon admission to UCLA, Gabriela was critically ill, with elevated CPK enzymes, indicating muscle breakdown, as well as developmental delay and hypotonia, also known as "floppy child" syndrome. She had not urinated for 12 to 14 hours before being admitted, so Dr. Koh was concerned about dehydration and treated her with fluids.

Gabriela was put on a heart monitor at 7:00 p.m. on March 2, about a half hour after being admitted to UCLA. The monitor showed no irregularities until about 4:00 a.m. on March 4, when Gabriela began to experience arrhythmias or premature ventricular rhythms (PVCs).[2] At that time, the monitor alarm sounded and staff responded. Lab tests ordered within two minutes of the start of the PVCs were normal. At 4:30 a.m., her vital signs were stable. Blood pressure and heart rate were normal and she was talking.

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[2] The father testified that on two occasions after 3:15 a.m. on March 4, before the monitor sounded, the monitor indicated "zeroes," but did not make any noise or raise any alarms. He was alone in the room with Gabriela the first time it happened and did not know what the monitor was measuring. Lacking a medical background, he did not know what it meant when "that thing hits zeroes," but opined "it means it's no good." Although he testified Gabriela was not breathing, he also stated she began breathing again when he merely shook her, and that two doctors came into the room in response to his concerns, examined Gabriela and the monitor and found nothing wrong. The father further testified that when the monitor "had zeroes" a third time, an alarm sounded and doctors responded.

At 4:50 a.m., Gabriela coded. Bag mask ventilation began. Nurses began CPR. Gabriela was transferred to the ICU and a defibrillator was used. She began breathing on her own with the face mask. However, while in ICU, Gabriela suffered numerous cardiac arrests and died of renal failure due to hypoxia, possibly through cardiac arrest.

2. *Proceedings*.

On December 6, 2000, Gabriela's parents, the plaintiffs herein, filed a complaint for wrongful death against the Regents and Dr. Koh. Trial commenced on September 11, 2002.

The plaintiffs' expert witness, Dr. Maggi, opined defendants were negligent in the following areas: failing to admit Gabriela to ICU upon admission to UCLA; failing to supervise a resident; improperly focusing on diagnosing Gabriela's condition instead of treating it; failing to monitor ionized calcium prior to admission to ICU; mismanaging electrolytes prior to arrest; failing to use steroids; and failing to intubate Gabriela after the code in the early morning of March 4, 2000.

The Regents, in turn, introduced evidence that: Gabriela was not sick enough to admit to ICU on March 2; Drs. Koh and Spence properly supervised their residents; defendants properly treated Gabriela's symptoms while attempting to diagnose her condition; the standard of care did not require ionized calcium levels to be monitored prior to the arrest under the circumstances; electrolytes were properly monitored at all times and were not abnormal, steroids were not required and would not have been helpful; and Gabriela received adequate oxygenation in response to the code through a bag mask, and therefore intubation was not required at that time.

a. *Deliberations and verdict.*

The matter was submitted to the jury on a special verdict form which asked the jury to determine the negligence of the Regents, Dr. Koh, and Dr. Spence, who was not a named defendant.

During deliberations, the jury submitted the following written question to the court: "Can the jury find that UCLA Hospital was negligent but find that the named doctors in this case were not?" The trial court advised the jury it could find against the Regents, even if Drs. Koh and Spence were not negligent, if it found a healthcare provider employed by UCLA were negligent.

The jury resumed deliberations but was unable to reach a decision with respect to either Dr. Koh or Dr. Spence. The vote was split 7 to 5 in Dr. Koh's favor and 8 to 4 in Dr. Spence's favor. However, the jury returned a verdict against the Regents.

When the jury returned its verdict, the trial court inquired: "With respect to the negligence that was found as to the Regents, was there agreement as to the act of negligence that nine out or twelve or more agreed on?" The jury foreperson responded in the affirmative.

The trial court then asked "What was the act of negligence?" The foreperson replied: "We determined, we zeroed in on the time, the morning of the 4th, when Mr. Lujano was in the room with Gabriela and she had the two instances with the monitor indicating evidently she had arrhythmias, and our concern . . . is that with her history of heart murmur combined with the rhabdomyolysis that they were treating her for, and the possible mitochondrial disease, which all has to do with the function of a heart, if there was any indication on any monitor, not only once but especially twice, that they would ignore it and call it a glitch in the machine and not at least give her an EKG at that time."

The trial court then inquired: "Is there anybody that would articulate it any differently?" None did. The trial court later noted that as the foreperson was speaking, "I was observing all the jurors, and there was no one that wasn't even nodding in assent in some way or affirming in some way some agreement."

b. *The motion for new trial.*

The Regents moved for new trial, contending there was insufficient evidence to support the verdict, the verdict was against law, and the verdict was due to surprise. The Regents asserted the jury's finding of negligence, as set forth in the foreperson's statement in open court, was not supported by the evidence. The foreperson's statement indicated the jury concluded the Regents were negligent "on March 4, 2000 when, purportedly, the heart monitor went off and an unnamed nurse or physician did not respond appropriately." However, the evidence was insufficient to support the verdict because "[t]here was *no testimony* by any expert, retained or a treating physician, who stated that anything that occurred between 3:00 a.m. and 4:30 a.m. was below the standard of care or was a substantial factor in causing the death of GABRIELA LUJANO."

The Regents also filed a motion for JNOV, contending there was insufficient evidence to support the verdict.

Lujano's opposition papers contended the verdict was consistent with the evidence presented at trial. Lujano submitted four identical juror affidavits stating that 9 of the 12 jurors found the employees of the Regents "who entered the room of GABRIELA LUJANO in the early morning of March 4 prior to the initial cardiac arrest, fell below the standard of care in failing to monitor and correct the ionized calcium level of patient GABRIELA LUJANO." Lujano also contended the Regents were required to present juror affidavits of their own in order to prevail on the motion for new trial.

In their reply papers, the Regents contended the four identical juror affidavits submitted by Lujano were inadmissible, were contrary to Evidence Code section 1150, directly contradicted the unequivocal statement by the foreperson in open court, were obviously prepared by Lujano's counsel and provided no objective evidence.

The Regents also asserted no juror affidavits are required when a motion for new trial is based on insufficiency of evidence or error in law.[3]

c. *Trial court's ruling.*

On December 13, 2002, the matter came on for hearing. The trial court granted the Regents' motion for new trial, stating:

"The Court finds that the jury's verdict in favor of plaintiffs is not supported by the evidence and a new trial is therefore properly granted pursuant to Code of Civil Procedure Section [657] (6). Further, the Court finds that there is evidence of accident or surprise which ordinary prudence on the part of the defense could not have guarded against, justifying a new trial within the meaning of Code of Civil Procedure section [657] (3).

"A full restatement of the facts of the case is not necessary in light of the complete recitations provided by counsel in the papers. Following a verdict by the jury, in which jurors were hung seven to five in favor of Dr. Koh and eight to four in favor of Dr. Spence while nonetheless finding nine to three against defendant Regents, the foreperson was asked by the Court, at the request of defense counsel, to articulate that act of negligence which nine of the twelve jurors had relied upon in reaching their verdict. The transcript, as recited in both parties' papers, indicates as follows:

"We determined, we zeroed in on the time, the morning of the fourth, when Mr. Lujano was in the room with Gabriela and she had the two instances with the monitor indicating, evidently, she had arrhythmias and our concern is with her history of heart murmur, combined with the rhabdomyolsis, that they were treating her for and the possible mitochondrial disease, which all has to do with the function of the heart, if there was any indication on any monitor, not only once, but especially twice, that they would

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[3] The Regents' position was correct. Juror affidavits are *not* required when a party seeks a new trial based on insufficiency of the evidence to justify the verdict or legal error. (§ 658.)

ignore it and call it as a glitch in the machine and not at least give her an EKG at that time.

"The Court carefully listened to the statement articulating this act of negligence and noted the affirmation in the form of nods provided by the majority of the other jurors. The other jurors were invited to respond separately if this articulation did not support their position and none provided any different position or theory.

"BAJI 6.30 clearly requires that any conclusion by a jury on the standard of care in a medical negligence action must be limited to the opinions of expert witnesses testifying to that standard of care. Such evidence, unless it is within the common knowledge of lay persons, must be by expert testimony alone. [Citations.] The subject matter in question in this case is not within the common knowledge of laypersons. The issue of the functioning of heart monitors, mitochondrial disorders, electrolyte imbalances and EKGs are not within the legally defined realm of common knowledge of lay persons.

"The experts in the trial never testified that the treatment provided in early morning hours of March 4, [2000], referring to the functioning of the heart monitor and whether or not an EKG should have been administered, fell below the standard of care. Mr. Lujano testified to the events between 3:00 a.m. and 4:00 a.m. and included the fact that he had no idea how a heart monitor functioned or what it meant when 'the thing hit zeroes'. There was no evidence presented as to the manner in which any irregularity of the heart monitor was a substantial factor causing the death of Gabriela Lujano nor that the reaction of the hospital staff to the operation of the heart monitor fell below the standard of care. There was testimony by Dr. Wong that had an EKG been performed between 3:00 a.m. and 4:00 a.m., it would not have made any difference in the medical condition of Gabriela. The evidence reflected normal electrolytes between the first episode of ventricular tachycardia and Gabriela's cardiac arrest. Defense expert Dr. Maggi also testified that the lab results sent within minutes of the heart irregularities were essentially normal.

"Further, the Court finds that there was surprise as an additional ground for a new trial. Plaintiffs' position and expert testimony never included any statement that the conduct, as relied upon by the jury, was below the standard of care, was the subject of negligence or was a substantial factor in causing the death of Gabriela. The theory of negligence relied upon by the jury that the actions of the hospital staff in reacting to the operations of the heart monitor was neither presented, nor anticipated by either party. The defense cannot be faulted for not having responded to, nor guarded against, the position taken by the jury as to a theory never presented, nor set forth by any expert on behalf of plaintiffs. The inability of the defense to have anticipated the reactions of the jurors, the absence of notice provided and the absence of expert evidence presented on the issue mandates the granting of defendant's motion. In this case, justice demands no less.

"In making this ruling, the Court has not considered the four identical juror affidavits presented by plaintiffs as the Court finds the affidavits to be improper post-trial juror affidavits seeking to explain the jury's mental processes in violation of Evidence Code Section 1150. Even assuming the Court found the affidavits admissible, they are not persuasive as all four affidavits are identical in form, based on speculation and lacking in foundation as to the conclusions proffered."

After granting the motion for new trial, the trial court took the motion for JNOV off calendar as moot.

Lujano appealed the order granting a new trial. The Regents filed a protective cross-appeal from the judgment on the verdict.[4]

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[4] The Regents' notice of cross-appeal also specified the trial court's ruling on the motion for JNOV. However, the Regents' briefs solely seek a new trial, either by way of affirmance of the new trial order, or by way of reversal of the underlying judgment.

CONTENTIONS

Lujano contends: the trial court abused its discretion in questioning the jury foreperson as to the reasoning for the verdict and in granting the Regents' motion for new trial based upon the juror's statement, and the evidence presented at trial was sufficient to support the verdict.

The Regents, in turn, assert the trial court properly relied on the foreperson's statement to clarify the verdict and grant the new trial. On cross-appeal, the Regents contend a new trial is warranted even if this court does not consider the foreperson's oral statement clarifying the verdict because the verdict is inherently inconsistent and cannot be based on the purported failure to intubate.

DISCUSSION

1. *Overview*.

The grounds for vacating a verdict and granting a new trial include "[i]nsufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law" (§ 657, subd. (6)) and "[a]ccident or surprise, which ordinary prudence could not have guarded against." (§ 657, subd. (3).)

"When a trial judge grants a motion for new trial based on insufficiency of the evidence, it is *not* because the judge has concluded that the plaintiff *must* lose, but only because the evidence in the trial that actually took place did not justify the verdict." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 752.)

That is what occurred here. The trial court determined, based on the foreperson's statement in open court, that the verdict against the Regents was not supported by the evidence. According to the foreperson, the jury held the Regents liable on the ground their employees failed to respond appropriately to the monitor data in the early morning hours of March 4, 2000 and at least should have administered an EKG at that time to Gabriela. However, the trial court found, "[t]he experts in the trial never testified that the treatment provided in early morning hours of March 4, [2000], referring to the

functioning of the heart monitor and whether or not an EKG should have been administered, fell below the standard of care."

The threshold issue presented is whether the trial court erred in considering and relying on the foreperson's statement in granting the motion for new trial.

2. *Trial court erred in granting new trial based upon foreperson's statement, which statement was an exposition of jury's thought processes.*

Evidence Code section 1150 states in relevant part: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

As explained in *Maple v. Cincinnati, Inc.* (1985) 163 Cal.App.3d 387, "If there is one thing which is clear from the language of Evidence Code section 1150 and the case law dealing with the subject, it is that the mental processes of the jurors are beyond the hindsight probing of the trial court. [¶] One of the primary reasons for limiting a juror's ability to impeach the verdict to the areas of chance verdicts and disqualification is to prevent minority jurors in less than unanimous verdicts from attacking the majority's decision by claiming 'misconduct.' [¶] The trial court's order here is a classic example of the need for and the wisdom of the limitations on the use of statements of jurors to impeach a verdict. None of the statements attributed to the jurors revealed anything about their qualifications to serve and of course contained no evidence of a verdict arrived at by lot or chance. The trial judge simply made a subjective determination that the jurors didn't think or analyze the case 'correctly,' a determination triggered by statements of a juror who had voted in the minority. [¶] If a trial judge believes that the evidence is objectively insufficient as a matter of law to support a verdict, he or she of course has the power under Code of Civil Procedure section 657 to order a new trial on that basis. The trial judge does not, however, have the power to pass judgment on the

correctness of the jurors' thought processes involved in weighing the evidence. [¶] The jury system in this country is based on the belief that nonprofessional jurors will bring to the factfinding process a combination of community attitude and practical wisdom born of real life experience which is to be preferred to the more legalistic approach of the professional jurist. [¶] Since jurors are nonprofessional, the statements they make during deliberations and the arguments they may advance in attempting to persuade their fellow jurors to a particular point of view might not always get high marks from legal or forensic experts. On the other hand, attempts by judges to straight jacket a jury in its deliberations by an after-the-fact critiquing and criticizing of the language and reasoning used in those deliberations runs directly contrary to our fundamental concept of the jury function." (163 Cal.App.3d at p. 394.)

Here, the foreperson's statement that "we zeroed in" on the events occurring in the early morning hours of March 4 was an exposition of the jury's thought processes in arriving at the verdict. Therefore, the foreperson's statement was inadmissible and the trial court's reliance thereon in granting the new trial was erroneous.[5]

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[5] Lujano did not object on the record at the time the trial court inquired of the foreperson as to the specific act of negligence underlying the verdict. However, Lujano did not thereby waive the issue. The rule of "invited error by waiver does not apply to noncurable defects of substance where the question is one of law such as lack of jurisdiction or complete failure to state a cause of action. [Citation.]" (*Wiley v. Southern Pacific Transportation Co*. (1990) 220 Cal.App.3d 177, 187-188.) What occurred here was not merely an erroneous evidentiary ruling. " '[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, *it has exceeded its jurisdiction* . . . .' [Citations.]" (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 6, italics added.) Section 625 provides for special interrogatories to test the validity of a general verdict by determining whether all facts essential to its support were established to the satisfaction of the jury. (*Masonite Corp. v. Pacific Gas & Electric Co.* (1976) 65 Cal.App.3d 1, 11.) The trial court did not proceed in accordance with section 625. Instead, the trial court orally inquired of the foreperson as to the jury's factual finding underlying the verdict. The trial court in effect solicited an oral special verdict in the form of a narrative, a procedure which has no basis in the code. Given the nature of the error, Lujano did not waive the issue by failing to object on the record below.

3. *Trial court's error in granting a new trial based on the foreperson's statement was harmless because the grant of a new trial was correct in result and therefore must be upheld.*

a. *Scope of review.*

"We independently review all the grounds advanced for the new trial motion and will sustain the order 'if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons . . . .' (Code Civ. Proc., § 657.) That review includes searching the record, with the assistance of the party for whom the new trial was granted, 'to find support for any *other* ground stated in the motion . . . .' (*Mercer v. Perez* [(1968)] 68 Cal.2d [104,] 119.) While we give 'considerable weight to the expressed opinion of the trial court' [citation], we nonetheless exercise our own judgment, following our review of the record, to determine whether a new trial is legally required." (*Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 550.)

Here, the Regents' motion for new trial raised multiple grounds, including *insufficiency* of the evidence to support the verdict against the Regents. That is our focus here. In addressing the issue of insufficiency, we are mindful the jury did *not* find that either Dr. Koh or Dr. Spence was negligent in the medical care, diagnosis and/or treatment of Gabriela. Therefore, this verdict against the Regents cannot be based on any conduct attributable to Drs. Koh and/or Spence. Consequently, the verdict can be upheld only if there is substantial evidence to support a theory of liability that implicates negligent conduct by some other employee or employees of the Regents. We now address that issue.

b. *Verdict against Regents cannot be upheld under Lujano's theory that persons other than Drs. Koh and Spence were responsible for the failure to monitor Gabriela's ionized calcium levels before she was admitted to ICU.*

The sole theory advanced by Lujano on appeal as a basis for upholding the verdict was the alleged negligence of the Regents in failing to monitor Gabriela's ionized calcium levels before she was admitted to ICU.[6] However, the verdict cannot be upheld on this theory because it necessarily implicates the conduct of Drs. Koh and Spence.

Dr. Maggi, Lujano's expert, opined the mismanagement of the imbalance in Gabriela's electrolytes, specifically, calcium, caused the cardiac arrest. With respect to the negligence of the various persons involved in treating Gabriela, Dr. Maggi testified on cross-examination that apart from Drs. Koh and Spence, "[t]here was another resident involved. I don't remember exactly who it was. [¶] . . . [¶] . . . there was another resident involved writing orders of the patient, and the name of that resident I don't remember exactly."

Dr. Maggi then was asked: "But you are prepared to say that this unnamed resident contributed to the death of seven year old Gabriela Lujano; correct?"

Dr. Maggi responded: "Well, my initial statement was that the people at UCLA were negligent because they did not monitor this patient's essential electrolytes, calcium, the most important one, and that contributed to her death. [¶] . . . like I said before, *I don't like going to specifically blaming one or another physician.* [*sic*] *I think that the overall care at UCLA fell below standard of care*." (Italics added.)

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[6] On appeal, Lujano does not advance the failure to intubate as a basis for upholding the jury's verdict against the Regents.

Expert opinions " 'are worth no more than the reasons and factual data upon which they are based.' [Citation.]" (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607.) A medical expert must assert "specific factual breaches of duty . . . ." (*Ibid*.) Dr. Maggi's statement the "overall care" was negligent, coupled with his reluctance to "specifically blam[e]" a particular physician or employee of UCLA, was insufficient to meet Lujano's burden of establishing negligence on the part of the Regents.

With respect to the chain of command in Gabriela's case, from her admission on March 2nd until she went into ICU at about 5:30 a.m. on March 4, Dr. Koh testified as follows. Dr. Koh stated "any orders, any type of diagnosis, anything to do with the child, although the intern writes the orders, it must go through the pediatric neurology attending, which is me, or the pediatric neurology fellow, which is [Dr.] Spence."

Consistent therewith, Dr. Maggi himself testified that UCLA is a teaching institution, "and the people that are mostly responsible for the care of these patients are not the residents, [they] are the attendings that are in charge and should be supervising the care that the residents are providing." Thus, by Dr. Maggi's own admission, the unnamed resident whom he faulted was under the supervision of Gabriela's physicians, namely, Dr. Koh and Dr. Spence.

Thus, Lujano's theory that the Regents were negligent in failing to monitor Gabriela's ionized calcium necessarily implicated the conduct of Drs. Koh and Spence. Leaving aside the negligence of Drs. Koh and Spence, which remains to be determined, Lujano has failed to present substantial evidence to support a theory of liability that implicates independent negligent conduct by another Regents' employee. Accordingly, the trial court properly granted the Regents' motion for new trial.[7]

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[7] Lujano also contends the conduct of two unidentified UCLA physicians, who entered Gabriela's room prior to the initial cardiac arrest and prior to her admission to ICU in the early morning hours of March 4, fell below the standard of care in that they failed to monitor and correct Gabriela's ionized calcium level. Lujano contends that *all* physicians who entered Gabriela's room prior to the initial cardiac arrest were agents of the Regents and owed a duty of care. The flaw in this argument is, as the Regents point

4. *Cross-appeal not reached.*

Because we affirm the trial court's order granting a new trial, it is unnecessary to reach the issues raised in the Regents' protective cross-appeal from the judgment.

DISPOSITION

The order granting the Regents' motion for new trial is affirmed. No costs are awarded.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

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out, no expert testified that anything happened during the monitor incidents that would have alerted a reasonable physician to check ionized calcium at that point, despite the failure of the treating physicians to order such monitoring. Although Lujano repeatedly cites Dr. Maggi's opinion that "the overall care at UCLA fell below [the] standard of care," that generalized statement is insufficient to carry the day.